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IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

—v.—

JAMES DALE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE AMERICAN COUNSELING ASSOCIATION, AND THE AMERICAN ORTHO-PSYCHIATRIC ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

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INTERESTS OF AMICI CURIAE

Amici are national organizations devoted to promoting physical and mental health and supporting scientifically reliable research on health issues. They have each adopted positions advocating an end to discrimination based on sexual orientation as beneficial to the public health and welfare. *Amici* believe they can help inform the Court's consideration of the social science and policy issues implicated by this case.

The American Public Health Association ("APHA") is devoted to the promotion and protection of personal and environmental health and to disease prevention. Founded in 1872, APHA is the world's largest health organization, with over 50,000 affiliated members from all disciplines and specialties in public health. The National Association of Social Workers ("NASW") is the world's largest membership organization of professional social workers, with over 155,000 members. NASW works to enhance the professional growth and development of its members, create and maintain professional standards, and advance sound social policies. The American Counseling Association ("ACA") is a not-for-profit professional and educational organization dedicated to the growth and enhancement of the counseling profession. Founded in 1952, ACA is the world's largest association exclusively representing professional counselors. The American Orthopsychiatric Association, founded in 1924, provides a common ground for collaborative study, research, and knowledge exchange among individuals from a variety of disciplines engaged in preventive, treatment, and advocacy approaches to mental health.[1]

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[1] All parties have consented to the submission of this brief through letters filed with the Clerk of the Court. *Amici* state that no portion of this brief was authored by a party and that no outside person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

This case invokes this Court's longstanding directive that outmoded assumptions and stereotypes about a person's status have no place in assessing the First Amendment interests of an organization seeking an exemption from state antidiscrimination laws. Although James Dale served most of his life as an exemplary member and adult leader of the Boy Scouts of America ("BSA" or the "Boy Scouts"), BSA summarily expelled him when it learned, through outside sources, that he was gay. This action violated New Jersey's Law Against Discrimination ("LAD") unless that law's application directly burdens an actual expressive purpose of Boy Scouts' members.

The record supports the New Jersey Supreme Court's conclusion that BSA does not have an expressive purpose concerning homosexuality that might justify a First Amendment exemption from the LAD. BSA's membership programs and materials do not expressly address homosexuality. BSA nevertheless argues that Dale's mere presence burdens its expression because its general statements on "morality" are understood by its members to convey the view that homosexuality is "immoral." But there is no longer any broad consensus on this issue among BSA members or in society at large. In New Jersey, the notion that gay people, as such, should be excluded as "immoral" has been soundly repudiated. BSA's general teachings on morality thus cannot be seen today as conveying to BSA members any clear message about homosexuality.

The purposes that actually do bring together scouting's members concern citizenship, recreation, and character. BSA cannot assume that Dale or other gay scouts or leaders will interfere with its expression on *these* matters simply because they are gay. A person's sexual orientation tells nothing about his views, character, or conduct. Therefore, any claim that Dale's membership undermines these *actual* purposes of scouting is based on stereotypes, something forbidden by this Court's expressive association cases.

Decades of mainstream social science also unequivocally refute the stereotypes that the courts below recognized are implicit in BSA's First Amendment claim.

Even if the LAD's application worked some slight infringement on BSA's right of expressive association, this Court has recognized that such infringement may be justified to serve a compelling state interest in combating discrimination. 63a.[2] That interest – recognized by all three branches of New Jersey's government – is more than abstract policy: a large body of social science data, relied upon by many courts, demonstrates that the victims of sexual orientation discrimination suffer severe physical and psychological harms. Social science also confirms that anti-discrimination laws like the LAD are powerful remedies for the social ills caused by discrimination against gay people and other minorities. New Jersey's compelling interest decisively outweighs any marginal impact that the LAD may have on BSA's expressive association interests.

ARGUMENT

POINT I

BSA MAY NOT RELY ON OUTMODED ASSUMPTIONS AND STEREOTYPES ABOUT GAY PEOPLE TO OBTAIN A FIRST AMENDMENT EXEMPTION FROM NEW JERSEY'S LAW AGAINST DISCRIMINATION

When BSA argues that James Dale's presence among a million adult members of scouting would "contradict the stated mission and message of the organization," *Dale Pet. for Cert.* at 19 (No. 99-699), it means one of two things: either (i) that BSA members join to express an actual viewpoint on sexual orientation that would be undermined by Dale's mere presence, or (ii) that Dale's gay identity alone is an accurate predictor of how he will act and what views he will

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[2] Cited numbers followed by "a" refer to pages in the appendix submitted by BSA with its Petition for Writ of Certiorari. Numbers preceded by "JA" refer to pages in the Joint Appendix.

express within scouting. The New Jersey Supreme Court properly held that the former premise is factually groundless and the latter is a legally impermissible application of false stereotypes.

A. BSA Members Do Not Associate to Express Any Views on Homosexuality or Sexuality Generally

BSA argues that the mere presence of a known gay person in its ranks will undermine its core principles. But scouting's programs focus on citizenship, outdoor recreation, and development of character, not sexuality. BSA nevertheless insists that its general statements about "morality" are recognized by its members as expressing the allegedly self-evident fact that gay people are inherently immoral. This position is no longer tenable, if it ever was, given the evolution of public attitudes toward gay people both nationally and in New Jersey.

1. *The New Jersey Supreme Court Correctly Identified BSA's Actual Expressive Purposes in Considering Its First Amendment Claim*

To claim a First Amendment exemption from an applicable antidiscrimination statute, an organization must first establish that the statute's application will impede its members' shared goals. *See Roberts v. United States Jaycees*, 468 U.S. 609, 627 (1984) (no basis in record for concluding that "admission of women as full voting members will impede the organization's ability to engage in [its] protected activities or to disseminate its preferred views"); *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548 (1987) ("*Rotary Club*") (prohibiting Rotary Clubs from excluding women did not require them to "abandon their basic goals of humanitarian service, high ethical standards in all vocations, good will, and peace").

The right of expressive association does not protect an organization's ability to discriminate in furtherance of every view that any of its members or leaders happen to espouse, but "only those views *that brought them together*." *Roberts*, 468

U.S. at 623 (emphasis added). BSA is not entitled to a special exemption from the LAD unless it can establish that the law's application will directly impede an actual purpose or message that brings its members together.

Relying on BSA's own membership materials, 2a n.1, the New Jersey Supreme Court found that BSA "seeks 'to promote ... patriotism, courage, self-reliance, and kindred virtues,'" 5a, "'instill values in young people and ... prepare them to make ethical choices over their lifetime in achieving their full potential,'" 5a, and "foster 'strength, confidence, and good judgment' by providing boys with a 'world full of exciting adventures' and the opportunity 'to go places and do things,'" 53a. To effectuate these purposes, "BSA trains and educates boys in camping and other outdoor activities, democracy, civics, respect for the family, personal strength and development, self-sufficiency and sexual responsibility." 136a. BSA recognizes that "the skills it teaches its members are needed 'in all economic, cultural, and ethnic groups'" and therefore strives for a "diverse and 'representative' membership." 59a.[3]

The New Jersey Supreme Court identified the general inculcation of moral values as one of BSA's members' varied expressive purposes. 53a. But BSA defines morality as turning on individual conscience and a scout's personal "religious beliefs" – not specific positions on particular social issues. 55a. This definition necessarily precludes any "specific expressive purpose" with respect to sexual orientation, since the actual participants in scouting – including its sponsoring organizations – have widely varying personal

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[3] The acceptance of gay people in its ranks would thus actually enhance one of BSA's professed core values. *Compare* 59a ("The exclusion of members solely on the basis of their sexual orientation is inconsistent with Boy Scouts' commitment to a diverse and 'representative' membership.") *with Rotary Club*, 481 U.S. at 548-49 ("[B]y opening membership to leading business and professional women in the community, Rotary Clubs are likely to obtain a more representative cross section of community leaders with a broadened capacity for service.")

and religious views regarding the morality of homosexuality.[4] The recruiting and informational materials available to current and prospective members nowhere recite that members share the view that homosexuality is immoral. Indeed, hundreds of scouts, including Dale, stated in affidavits that they were unaware of any Boy Scout position on the morality of homosexuality. 91a.

The absence of any express "message" about homosexuality is not surprising, because sex and sexual orientation are simply not scouting issues. Scoutmasters are instructed to refer questions on sex to parents or clergy. 9a. To the limited extent "sexual responsibility" is part of the curriculum, the focus is on discouraging premarital sex generally, not expressing approval or disapproval for anyone's orientation. 9a.[5]

In short, the New Jersey Supreme Court correctly found that "Boy Scouts' members do not associate for the purpose of disseminating the belief that homosexuality is immoral." 52a. Thus, no expressive purpose of the members is burdened by applying the LAD to BSA.

2. *BSA May Not Invoke Outmoded Societal Attitudes About Homosexuality to Create An Actual Expressive Purpose Regarding Sexual Orientation*

Admitting that its members do not associate to reject homosexuality expressly, BSA argues that they infer such a purpose from its general statements on morality. BSA claims that for many years after its 1910 founding there existed a broad societal consensus that homosexuality was inherently immoral. BSA Br. at 5. Based on these historical attitudes, BSA maintains that its expressive purposes

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4 BSA repeatedly renews the charters of sponsoring organizations that adhere to the view that homosexuality is not immoral. 55a-56a.

5 There is no indication that BSA expels as "immoral" or incapable of serving as positive role models heterosexual leaders who do not conceal their premarital relationships.

regarding homosexuality are reflected in its requirements that members be "clean" and keep themselves "morally straight."

These attributes "do not, on their face, express anything about sexuality, much less that homosexuality, in particular, is immoral." 55a. And BSA defines "clean" and "morally straight" in broad terms that belie any claim of a specific coded reference to homosexuality. The term "clean" encompasses cleanliness of body and mind, including the rejection of "'swear words, profanity, dirty stories,'" as well as "'racial slurs and jokes making fun of ethnic groups or people with physical or mental limitations.'" 55a. The term "morally straight" means "'[t]o be a person of strong character, guid[ing] your life with honesty, purity, and justice'" and "'[r]espect[ing] and defend[ing] the rights of all people.'" 54a. It cannot be said credibly that these concepts — either on their face or as defined by BSA — convey anything whatsoever about sexuality.

BSA argues that these terms — and its more general statements about "morality" — are nevertheless understood to convey a core message on sexual orientation. But this incorrectly presumes that early 20th Century mores survive relatively unchanged today. To the contrary, public attitudes towards homosexuality have become quite diverse and, particularly in New Jersey, the majority view increasingly opposes excluding gay people from civic life based upon mere identity. Accordingly, BSA may not assume that its general "morality" message is understood by its members to refer to sexual orientation.

Americans today increasingly favor the notion of equality for gay men and lesbians. *See, e.g.*, Alan S. Yang, *From Wrongs to Rights, Public Opinion on Gay and Lesbian Americans Moves Toward Equality* (NGLTF Policy Inst. 1998). For example, there has been a remarkable change in the proportion of Americans who believe that gay people should be eligible to serve as school teachers, a position that, like a scout leader, involves inculcating moral values in youth. A Gallup poll

trend shows that support for hiring gay people as elementary school teachers doubled from 27% in 1977 to 55% in 1996. *Id.* at 10. Similarly, support for hiring gay people as high school teachers rose from 47% in 1989 to 60% in 1996. *Id.* (citing *Gallup* polls). Several recent polls show that a majority of Americans consider homosexuality an "acceptable" alternative lifestyle. *Gallup Poll* conducted Feb. 8, 1999 (50% of respondents "feel that homosexuality should be considered an acceptable alternative lifestyle); *Time/CNN Poll* conducted Oct. 15, 1998 (52% of respondents feel that "different kinds of lifestyles ... such as homosexual relationships" are "acceptable for others, not self," and another 12% feel that they are "acceptable for others and self"). A recent Newsweek poll found that less than half of the general public surveyed, 46%, say they personally believe homosexuality is a sin, a decrease from 54% two years ago. John Leland, *Shades of Gay*, Newsweek, Mar. 20, 2000, at 49.[6]

Recognizing these trends, judges have come to accept less frequently the notion of "immorality" as a basis for treatment of gay people under the law. Editors, *Developments in the Law: Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1514 (1989).[7] Numerous social, political, and religious

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[6] Although homosexual conduct is not at issue in this case, 98a (trial court's failure to differentiate between Dale's status and conduct was "manifestly in error"), *Amicus* Claremont Institute argues, without any cited support, that homosexual conduct is viewed as "*malum in se.*" Brief of Amicus Curiae the Claremont Institute Center for Constitutional Jurisprudence in Support of Petitioners ("Claremont Br.") at 25. Public attitudes toward homosexual conduct do not support this argument; while a small majority continues to disapprove of homosexual conduct, this view is far from universal, and the disapproval rate has dropped significantly in recent years. Yang, *supra*, at 2.

[7] This trend echoes the repudiation of judicial reliance on archaic stereotypes about the inherent personal moral worth of African Americans. In another time, this Court rationalized the subjugation of black Americans as "property," in part because they were historically viewed as immoral. *Dred Scott v. Sandford*, 60 U.S. 393, 409 (1857) (observ-

(footnote continued)

institutions have similarly rethought their positions on the inherent immorality of gay people. Even the Roman Catholic Church, a major scouting sponsor that adheres to an extremely conservative view of sexual morality, does not view a gay person as inherently immoral:

> [T]he Church teaches that homogenital behavior is objectively immoral, while making the important distinction between this behavior and a homosexual orientation, which is not immoral in itself. It is also important to recognize that neither a homosexual orientation, nor a heterosexual one, leads inevitably to sexual activity. One's total personhood is not reducible to sexual orientation or behavior.

National Conference of Catholic Bishops (United States Catholic Conference), *Always Our Children: A Pastoral Message to Parents of Homosexual Children and Suggestions for Pastoral Ministers* (A Statement of the Bishops' Committee on Marriage and Family 1997).

Consistent with these national trends, the evolution of public mores in New Jersey undercuts the argument that scouting's members view homosexuality as per se immoral. The people of New Jersey, through their elected representatives, have repudiated that perspective by enacting protections against sexual orientation discrimination in the LAD. 62a (addition of sexual orientation to LAD "was an implicit recognition that discrimination based on 'archaic'

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ing that from founding of Republic, blacks were "looked upon as so far below [whites] in the scale of created beings, that intermarriages between white persons and negroes or mulattos were regarded as unnatural and immoral . . . [and] this stigma, of the deepest degradation, was fixed upon the whole race"). Of course, the *Dred Scott* decision was long ago discredited. While public views on homosexuality have not yet evolved to the same extent as those on race, neither do they remain so monolithic that BSA can assume that its views on "morality" are understood by its members to invoke a shared "stigma" fixed on all gay people.

and 'stereotypical notions' about homosexuals that bears no relationship to reality cannot be countenanced"). Accordingly, BSA may no longer rely on any presumed social consensus to infer its members' expressive purposes, 100a:

> It is not tenable to conclude that because at one time "traditional moral values" were based on unsupportable stereotypes about homosexuals, those values have survived and endured unchanged in contemporary times. It is similarly untenable to conclude, in the absence of a clear, particular, and consistent message to the contrary, that Boy Scouts ... remains entrenched in the social mores that existed at the time of its inception.

In short, an organization as broadly inclusive as BSA, one that otherwise preaches tolerance and respect for diversity, cannot today claim an actual expressive purpose on sexual orientation issues without making that message more explicit to its members in its program and materials. While it has been litigating this issue since the 1980s, BSA has not revised its program materials to include the view that homosexuality is inherently immoral or any related message (leaving aside self-serving policy statements not actually disseminated to members). 54a n.12. This silence confirms that rejecting homosexuality is not an actual purpose of scouting, and that permitting Dale to remain in scouting would not change the speech of its members.[8]

[8] BSA suggests (Br. at 3) that its total silence on sexual orientation merely reflects that it teaches morality through positive example rather than negative admonition. But BSA's materials are replete with "don'ts" regarding pre-marital sex, 9a, offensive language, 55a, ridiculing the disabled, 55a, and a host of other things.

B. BSA Cannot Rely on Stereotypes to Assume that a Gay Scout Leader Would Do or Say Anything to Frustrate Its Actual Expressive Purposes

If, as demonstrated above, inherent moral disapproval of gay people is not an actual expressive purpose of scouting, then Dale's exclusion can be justified only by BSA's assumption that, because he is gay, he will say or do something to undermine the purposes for which its members actually do associate. But without knowing anything about Dale's actual views, character, or conduct, BSA can so assume only by resorting to stereotypes about gay people that mainstream social science has long rejected. Knowing that a young man is gay does not indicate whether he makes a good boy scout. It says nothing, for example, about whether he is trustworthy, honest, patriotic, or courageous — or even whether he likes camping.[9] Dale himself illustrated this point, excelling as a scout notwithstanding his sexual orientation. BSA's contrary assumption flows from illogical shorthand inferences based on status rather than views, character, or conduct. That reliance is impermissible as a matter of law and wrong as a matter of social science.

1. *An Organization Subject to Public Accommodation Laws May Not Rely On Unsupported Stereotypes to Ascertain the Views, Character, or Conduct of a Potential Member*

In assessing whether a particular applicant will significantly affect an organization's expressive purposes, thus potentially exempting it from an otherwise applicable public accommodation law, this Court has emphatically rejected reliance on stereotypes, which do not accurately predict a

[9] The Claremont Institute maintains that BSA "is *not* claiming that homosexual adult leaders are less likely than heterosexual adult leaders to be trustworthy, or brave, or loyal, and thus less able to serve as role models for those aspects of the Scout Law." Claremont Br. at 11 (emphasis in original). But that eliminates the only purported ground for excluding Dale that relates to the BSA's actual expressive purposes.

person's actual views, character, or conduct. *See Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984). ("[W]e decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."); *see also New York State Club Ass'n v. City of New York*, 487 U.S. 1, 13 (1988) (rejecting facial challenge to anti-discrimination law that "merely prevents an association from using race, sex, and the other specified characteristics as shorthand measures in place of what the city considers to be more legitimate criteria for determining membership").

Following this Court's lead, other courts have frequently rebuffed claims that the views, character, or conduct of a lesbian or gay man is ascertainable from his or her homosexual identity. *See, e.g., Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998) (rejecting reliance on negative community reaction to coach's sexual orientation as rational basis for termination because it was "based on nothing more than unsupported assumptions, outdated stereotypes, and animosity" rather than coaching ability); *Doe v. British Univ. N.A. Club*, 788 F. Supp. 1286, 1292 (D. Conn. 1992) (rejecting argument that child molestation is "foreseeable consequence of . . . sexual orientation," finding no evidentiary basis to conclude that "homosexuals are predisposed towards molesting or sexually assaulting minor males"); *People v. Garcia*, 92 Cal. Rptr. 2d 339, 344 (Cal. Ct. App. 2000) (prohibiting exclusion of jurors based on "stereotypes" and "group bias" about gay people because their "common perspective" of historical persecution would not lead to "identity of opinion").

Refusal to credit stereotypes does not mean that organizations subject to public accommodation laws lose the right to apply bona fide membership criteria. Groups whose members actually come together because of identity (e.g., KKK; B'nai B'rith) may exclude on that ground; the Boy Scouts is not required to admit girls. Nor does the LAD

mandate that scoutmaster positions "must be open to all members of the general public," BSA Br. at 43, any more than it requires a country club to hire a lifeguard who cannot swim. BSA can select (or expel) scouts and leaders based on their individual character, skills, experience, or conduct – but not on illegitimate shorthand inferences derived from mere identity, as was done here.

2. *BSA May Not Rely on Unsupported Stereotypes About Gay People to Claim that Dale Will Undermine its Members' Actual Expressive Purposes*

In the absence of "a unified Boy Scout position" expressed by its members on the inherent morality of gay people, such as might arguably justify a status-based exclusion, the New Jersey Supreme Court was satisfied that Dale's exclusion was "based on little more than prejudice" by BSA officals. 59a. In other words, "morality" was merely a proxy for negative assumptions based on Dale's gay identity. Echoing the observation in *Roberts* that discrimination based on "archaic and overbroad assumptions" regarding a person's status "deprives persons of their individual dignity," 468 U.S. at 625, the court noted that "[t]he invocation of stereotypes to justify discrimination is all too familiar. Indeed, the story of discrimination is the story of stereotypes that limit the potential of men, women, and children who belong to excluded groups." 59a-60a. The *Dale* court further noted that this Court "has not hesitated to uphold the enforcement of a state's anti-discrimination statute against an expressive association claim based on assumptions in respect of status that are not a part of the group members' shared expressive purpose." 56a (citing *Roberts*, 468 U.S. at 628, *New York State Club Ass'n*, 487 U.S. at 13).

The New Jersey Supreme Court found that BSA's expulsion of Dale was based solely on assumptions regarding his gay status, and not on any actual evidence that his views, character, or conduct conflicted with those shared by BSA's

members. 56a. Belying the accuracy of those stereotypes, through word and deed Dale "accept[ed] and endorse[d] Boy Scouts' moral principles." 57a. Thus, BSA violated the LAD when it terminated Dale based on stereotypical assumptions about the relative views, character, and conduct of homosexuals and heterosexuals, just as the Jaycees violated Minnesota's antidiscrimination law when it excluded women based on "unsupported generalizations about the relative interests and perspectives of men and women." *Roberts*, 468 U.S. at 628. That Dale was an exemplary participant in scouting for twelve years, earning over twenty-five merit badges and the rank of Eagle Scout, as well as serving as a scout patrol leader, assistant patrol leader, and assistant scoutmaster, 11a, reinforces that conclusion. *Cf. id.* at 627 (because Jaycees already invite women to share group's philosophy and participate in training and community activities, any claim that admitting women as full members will impede organization's ability to disseminate its views is "attenuated at best").

In *Roberts*, this Court noted that the generalizations about women relied upon by the Jaycees "may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees," but that, "[i]n the absence of a showing far more substantial than that attempted by the Jaycees," the Court "decline[d] to indulge in [] sexual stereotyping." *Id.* at 628. Here, similarly, BSA has not substantiated its stereotypical thinking – there is no proof that a gay scout leader will in fact undermine the actual shared purposes of instilling in boys the qualities of patriotism, courage, self-reliance, honesty, and civic virtue. Indeed, social science emphatically debunks the stereotypes about gay people underlying any assumed tension between homosexuality and the basic tenets of Scout law.

While BSA has generally avoided explicitly invoking stereotypes to justify Dale's expulsion, several have been implicit in its arguments and were elucidated and endorsed by the trial court. One "particularly pernicious stereotype"

about gay people that is "implicit in Boy Scouts' arguments" is that "gay scout leaders will somehow cause physical or emotional injury to Scouts." 97a. BSA again invokes this stereotype, however obliquely, when it suggests that Dale's participation is inappropriate because scouting involves "hiking and camp-outs far from the public gaze," BSA Br. at 40, and a great deal of intimacy among members, *id.* at 41 ("When an 11 year-old boy away from home for the first time becomes afraid at night, skins his knee, or forgets his sleeping bag, he looks to his Scoutmaster for support.").

Many of the *amicus* briefs submitted in support of BSA are far less subtle. These briefs – particularly those of the Family Research Council ("FRC"), the Public Advocate of the United States ("Public Advocate"), and the Family Defense Council ("FDC") – overtly invoke stereotypes of gay people as promiscuous pedophiles bent on recruiting young scouts to homosexuality. These groups represent, by and large, not mainstream social scientists but right-wing religious activists.[10] Because they are driven by moral conviction and ideology rather than the spirit of neutral scientific inquiry, they cite sources that are equally biased – often little more than junk science[11] – and therefore

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[10] FRC and FDC are fringe organizations that have strongly held anti-gay beliefs. FRC "believes that homosexuality is unhealthy, immoral and destructive to individuals, families and societies. . . . [and] opposes any attempt to equate homosexuality with civil rights or to compare it to benign characteristics such as skin color or place of origin." <http://www.frc.org/issues/homosexualmain.html>. Similarly, FDC's chairman has stated that "homosexuality is an abomination according to the Torah," <http://web1.in4web.com/tushiyah/fdcv99hikind.htm>, and has protested the inclusion of gay concentration camp victims in the New York City holocaust memorial. Debra Nussbaum Cohen, *Boycott of Holocaust museum threatened for gay inclusion*, Jewish Telegraphic Agency, 1997 WL 11659558 (Apr. 12, 1997).

[11] This Court should hesitate to rely on materials that would not pass muster under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 594 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (footnote continued)

entitled to little weight.[12]

(*Daubert* applies to all expert testimony). *Daubert* requires courts to consider certain non-exclusive factors in weighing the scientific legitimacy of expert evidence: (1) whether the methodology employed has gained general acceptance in the relevant scientific community, (2) whether it has been peer reviewed, (3) whether it can (and has been) tested, and (4) whether there is a "known or potential rate of error."

[12] For example, FRC (Br. at 24-25) relies on the work of Paul Cameron, which has been discredited in both the public health community and the courts. *See* Amicus Brief of the American Psychological Association in Support of Dale ("APA Br."), at 11 n.40; *see also* <http: // psychology.ucdavis.edu/rainbow/html/facts_cameron.html> (noting six serious errors in Cameron's sampling techniques, survey methodolgy, and interpretation of results, any one of which makes his results flawed). FRC also relies heavily on The Gay Report, a journalistic book, which uses questionable survey methods. APA Br. at 11 n.40. Similarly, Public Advocate relies on the author G. Gallup – not to be confused with the polling organization – whose work is based on Cameron's flawed research and other unpublished, non-peer reviewed data. *See* Gordon G. Gallup, Jr., *Attitudes Towards Homosexuals and Evolutionary Theory: The Role of Evidence*, 17 Ethology & Sociobiology 281, 282 (1996).

Both Public Advocate (Br. at 24) and FRC (Br. at 23) also rely heavily on material published by NARTH, an organization that advocates reparative therapy, a psychotherapy aimed at eliminating homosexual desires that has been rejected by all major health and mental health professions. *See American Counseling Ass'n Governing Council* (Apr. 1999) (adopting position opposing promotion of reparative therapy as "cure" for homosexuality); *Policy Statement: Lesbian, Gay, and Bisexual Issues*, approved by Nat'l Ass'n of Social Workers Delegate Assembly (Aug. 1996), *printed in Social Work Speaks* (4th ed. 1997) (same); *Psychiatrists Reject Gay "Conversion,"* Wash. Post Nat'l, 1998 WL 22540805 (Dec. 13, 1998) (American Psychiatric Association joins American Psychological Association in rejecting conversion therapy as "likely to cause 'depression, anxiety and self-destructive feelings' in patients").

Perhaps most regrettable is FRC's quotation of a NARTH-affiliated psychiatrist for the astonishing allegation that a "'substantial, influential and growing segment of the homosexual community'" endorses pedophilia. FRC Br. at 25 (quoting Jeffrey Satinover, *Homosexuality and the Politics of Truth* 63 (1996)). The excesses to which certain of BSA's supporters go to defame gay people as a group reflects on both their credibility and the compelling need for legislation like the LAD to protect minorities from irrational hatred.

For example, the centerpiece of Public Advocate's argument that gay men tend towards pedophilia (Br. 24) is a study by Judith Reisman, "a key figure of the Christian American Right."[13] Judith A. Reisman, *Partner Solicitation Language As A Reflection of Male Sexual Orientation* (NARTH Collected Papers 1995). The study purports to demonstrate that gay men are pedophiles by comparing (a) the number of classified "personal" ads seeking teenage partners placed by heterosexuals in the *Washingtonian*, a mainstream news magazine, with (b) the number of such ads in *The Advocate*, at the time of the study a sexually oriented gay publication. Aside from the absurdity of drawing broad conclusions from data so limited and subject to innumerable confounding variables, the study was not peer reviewed, and its inclusion in the ideologically driven NARTH publication makes it highly suspect.

Mainstream social science rejects the stereotypes on which BSA and its supporters rely. For example, as Justice Handler observed, "[t]he myth that a homosexual male is more likely than a heterosexual male to molest children has been demolished." 97a. *See, e.g.*, Carole Jenny et al., *Are Children at Risk for Sexual Abuse by Homosexuals?*, 94 Pediatrics 41 (1994); Gregory M. Herek, *Stigma, Prejudice and Violence Against Lesbians and Gay Men*, in *Homosexuality: Research Implications for Public Policy* 70-71 (John C. Gonsiorek & James D. Weinrich eds. 1991) (hereinafter "Herek, *Stigma*") (citing studies); Kurt Freund et al., *Heterosexuality, Homosexuality, and Erotic Age Preference*, 26 J. Sexual Research 107, 115 (1989); Groh, et al., *The Child Molester: Clinical Observations*, 1 J. Soc. Work & Human Sexuality 129-

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[13] Features, *The Independent-London*, 1998 WL 16744044 (Aug. 10, 1998). Dr. Reisman is not a neutral social scientist. She has described homosexuality as one of "the social pathologies affecting us today" along with "sadomasochism, rape, child molestation" and other ills constituting a "destructive, downward spiral." *See* Interview, *Fight the Kinsey Fraud*, The New American, Vol. 15, No. 11, May 24, 1999, <http:// www.thenewamerican.com/tna/1999/05-24-99/vo15no11_ kinsey.htm.>

44 (1982); A. Nicholas Groth & H. Jean Birnbaum, *Adult Sexual Orientation and Attraction to Underage Persons*, 7 Archives Sexual Behav. 175, 180-81 (1978). These studies definitively refute any positive association between homosexuality and pedophilia or child molestation.[14]

As explained in greater detail in the APA's *amicus* brief (at 4-7), social science also has refuted the assumption that a scout is somehow likely to become gay through exposure to gay scouts or scout leaders. *See* Alan P. Bell, et al., *Sexual*

[14] The claim of FRC (Br. at 22-25) and Public Advocate (Br. at 24-26) that gay people are more likely to be pedophiles is based on mischaracterizations of published studies and is not otherwise grounded in legitimate science. *See* APA Br. at 11 nn.39-40. Besides relying on the flawed research of Reisman, Cameron, and *The Gay Report*, *see* 16-17 & n.12, *supra*, Public Advocate misrepresents *Human Sexual Inadequacy* by William H. Masters and Virginia E. Johnson as establishing that homosexuality is caused by adult recruitment of teenagers. The cited passage purports to show no such thing. It is merely a discussion about early homosexual experiences of a subgroup of heterosexual males experiencing secondary impotence.

Similarly, FRC mischaracterizes a study of child molesters by W. L. Marshall as establishing that "30 percent of those studied admitted to having engaged in homosexual acts as adults, and 91 percent of the molesters of non-familial boys admitted to no lifetime sexual contact other than homosexual." FRC Br. at 25. In reality, of 34 men studied who molested nonfamilial boys, "2 engaged in frequent homosexual behavior with adults," a figure of 6% not 30% as FRC represents. Additionally, there is no support for FRC's statement that 91% of the molesters were homosexual; the cited figure refers to the percentage of molesters who did not also molest girls. W.L. Marshall, et. al., *Early Onset and Deviant Sexuality in Child Molesters*, 6 J. Interpersonal Violence 323, 326 (1991). FRC apparently infers that any same-sex molestation necessarily involves a homosexual molester. However, attraction to children is entirely distinct from adult sexual orientation. *See* APA Br. at 10.

Indeed, BSA itself draws a distinction between pedophilia and homosexuality. National BSA Spokesman Blake Lewis has stated that "some people assume that we do not allow homosexuals because of concerns for child abuse. They're two totally separate issues." BSA's youth protection guidelines, distributed to its leaders, concede that it is a myth that "children are at greater risk of sexual victimization from gay adults than from straight adults." JA 538.

Preference: Its Development in Men and Women 186-87 (1981); Richard R. Troiden, *The Formation of Homosexual Identities*, 17 J. Homosexuality 43, 43-73 (1989) (reviewing research literature). One's sexual orientation typically emerges by early adolescence; may indeed be determined before that by genetic and/or early developmental factors; and once established is highly resistant to change. *See* Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. Consulting & Clinical Psych. 221 (1994); Douglas C. Haldeman, *Sexual Orientation Conversation Therapy for Gay Men and Lesbians: A Scientific Examination* in *Homosexuality: Research Implications for Public Policy* 149-60 (John C. Gonsiorek & James D. Weinrich eds. 1991). The fear that exposure to an otherwise qualified and appropriate gay scout leader will lead "impressionable" scouts to become gay (Public Advocate Br. at 26) is an expression of the most uninformed prejudice.

Studies have also shown that the children of homosexual parents (who obviously exert a greater developmental influence than a scout leader) are as psychologically well-adjusted as the children of heterosexual parents. Raymond W. Chan et al., *Psychological Adjustment among Children Conceived via Donor Insemination by Lesbian and Heterosexual Mothers*, 69 Child Dev. 443 (1998) (children of lesbian mothers show positive psychological development); Charlotte J. Patterson, *Children of the Lesbian Baby-Boom, Behavioral Adjustment, Self-Concepts, and Sex Role Identity* in *Lesbian and Gay Psychology* (Greene & Herek eds. 1994) (young children of gay and heterosexual families had similar social and psychological development).

Another common false assumption about gay people is that they are more "sexual" than heterosexuals. Indeed, there is frequently an "almost obsessive focus on homosexual activity," *Bowers v. Hardwick*, 478 U.S. 186, 200 (1986) (Blackmun, J., dissenting), to the exclusion of all other aspects of a gay person's life. Thus, the trial court below focused relentlessly on the "fact," extracted, without elabo-

ration, as the sole inquiry of counsel at oral argument, that Dale was "sexually active" – even though this issue played no role in Dale's expulsion. *See, e.g.*, 160a, 195a.[15]

Public Advocate's assertion (Br. at 25-26) that gay people as a group are more promiscuous than heterosexuals is unsupported by sound social science. The only study cited, Alan P. Bell & Martin S. Weinberg, *Homosexualities: A Study of Diversity Among Men and Women* (1978), is based on interviews during the 1970's with gay men recruited at San Francisco bathhouses and gay bars and through other methods likely to introduce sampling bias. *Id.* at 30. Such obviously outdated and skewed data hardly speaks to the lifestyles of most gay people in 2000, much less is it a basis for judging James Dale. Moreover, sex is equally important in homosexual and heterosexual relationships. *See, e.g.*, Lawrence A. Kurdek & Patrick Schmitt, *Relationship Quality of Partners in Heterosexual Married, Heterosexual Cohabiting, and Gay and Lesbian Relationships*, 51 J. Personality & Soc. Psych. 711-20 (1986) (finding no discernible differences between married heterosexual and gay and lesbian couples). A singular focus on a gay person's sexuality fails to consider the many aspects of that person's life that do not involve sex, "making for a highly constricted image of the persons involved." *Gay Rights Coalition v. Georgetown Univ.*, 536 A.2d 1, 35 (D.C. 1987) (quoting W. Paul, *Social Issues and Homosexual Behavior: A Taxonomy of Categories and Themes in Anti-Gay Argument*, in *Homosexuality: Social, Psychological and Biological Issues* 29, 46-52 (W. Paul & J. Weinrich eds. 1982)).

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[15] FDC similarly dwells on a particular sexual practice engaged in by both homosexual and heterosexual couples (Br. at 8), and even attempts to raise the spectre of HIV infection in an obvious attempt to use fear to justify Dale's expulsion (Br. at 9). But the National Institute of Allergy and Infectious Diseases states that more than 80% of all adult HIV infections worldwide have resulted from *heterosexual* intercourse. <http://www.niaid.nih. gov/factsheets/aidstat.htm>.

Social science data convincingly establishes that BSA's implicit reliance on stereotypes about gay people to predict that Dale's conduct or speech would undermine its members' *actual* expressive purposes is not just wrong as a matter of law, but also fundamentally flawed as a matter of fact.

POINT II

NEW JERSEY'S COMPELLING INTEREST IN ERADICATING DISCRIMINATION OUTWEIGHS ANY MARGINAL IMPACT ON BSA'S FIRST AMENDMENT RIGHTS

In 1991, when New Jersey added sexual orientation to the LAD's list of prohibited grounds for discrimination, it recognized what social science and court cases have repeatedly shown – that discrimination against gay people inflicts serious harm on both society and the individual. All three branches of New Jersey's government have emphatically declared that ending this discrimination is a compelling interest. The New Jersey Supreme Court, therefore, correctly concluded that even if Dale's membership works a slight infringement on BSA's members' First Amendment rights, that "infringement is justified because it serves . . . [New Jersey's] compelling interest in eliminating discrimination' based on sexual orientation." 64a (quoting *Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 549 (1987)).

A. All Three Branches of Government in New Jersey Recognize the State's Compelling Interest in Eradicating Sexual Orientation Discrimination

Both this Court and the New Jersey Supreme Court have recognized that states have a compelling interest in eliminating discrimination. *See Rotary Club*, 481 U.S. at 549; *David v. Vesta Co.*, 212 A.2d 345, 359 (N.J. 1965). Both courts have also held that state anti-discrimination laws may outweigh First Amendment interests in the public accommodation setting because "acts of invidious discrimination in the distribution of publicly available goods, services, and

other advantages cause unique evils that government has a compelling interest to prevent – wholly apart from the point of view such conduct may transmit." *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984); *see* 63a.

New Jersey's Legislature, recognizing the compelling interest in eradicating discrimination, many years ago enacted the LAD to address discrimination in public accommodations, employment, and other settings. The Legislature specifically found that the State had an important interest in eradicating the harms of discrimination, including "economic loss; time loss; physical and emotional stress; and in some cases severe emotional trauma, illness, homelessness or other irreparable harm." N.J. Stat. Ann. § 10:5-3 (West 1983). New Jersey courts have consistently recognized the LAD as a powerful, positive force in the life of the state, "a shining beacon of reason and hope to those who have suffered the painful sting of prejudice." *Poff v. Caro*, 549 A.2d 900, 905 (N.J. Super. Ct. Law Div. 1987).

In 1991, the Legislature added "sexual orientation" to the prohibited grounds of discrimination covered by the LAD. In so doing, it recognized that sexual orientation discrimination is harmful and undermines New Jersey public policy, and that the state has a compelling interest in eliminating it.

Like the Legislature, New Jersey courts historically have recognized the arbitrariness of discriminating against individuals based solely on their sexual orientation. *See, e.g., One Eleven Wines & Liquors, Inc. v. Division of Alcoholic Beverage Control*, 235 A.2d 12, 18 (N.J. 1967) (rejecting argument that permitting "apparent homosexuals" to congregate at bar threatens public welfare); *Poff*, 549 A.2d at 905 ("[R]efus[al] to extend ... [LAD's] protection to homosexuals because they may be more susceptible to a dread disease would mark a return to a past of judging individuals on the basis of ignorance and prejudice.").[16]

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[16] New Jersey's judiciary has also sought to ensure equal treatment of gay people in its courts. In 1993, New Jersey's Code of Judicial Con-

(footnote continued)

Citing this history, the *Dale* court underscored that New Jersey has an "unquestionably" compelling interest in eliminating discrimination based on sexual orientation. 62a. Governor Christine Todd Whitman, in the tradition of previous New Jersey governors,[17] "applauded" the *Dale* court's repudiation of sexual orientation discrimination, noting that "[i]f the troop leader is a good leader, there's no reason to worry about his sexual preferences." Robert Hanley, *New Jersey Court Rules Boy Scouts Ban on Gays Illegal*, San Diego Union Tribune, August 5, 1999, at A-1.

The people of New Jersey have recognized the harm caused to gay people by discrimination of the type inflicted by BSA on Dale. All three branches of government in New Jersey have recognized the compelling interest in eradicating that discrimination. Nothing in the Constitution of the United States precludes or should be deemed to override this democratic judgment.

B. Social Science Data Proves that Discrimination on the Basis of Sexual Orientation Causes Both Physical and Psychological Harms

Social scientists and the courts have long recognized that prejudice causes harm to both individuals and society. In *Brown v. Board of Education*, 347 U.S. 483 (1954), this Court, relying on psychological and sociological studies, observed

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duct was amended to admonish judges not to discriminate on the basis of sexual orientation. *See* New Jersey Code of Judicial Conduct Canon 3A(4)(1993) ("A judge should be impartial, and should not discriminate because of ... sexual orientation."). In 1998, the New Jersey Supreme Court established the Task Force on Gay and Lesbian Issues to investigate the extent of sexual orientation bias in the judiciary. Elizabeth Amon, *Panel to Begin Fact-Finding on Sexual Orientation Bias*, N.J.L.J., Mar. 23, 1998, at 6.

[17] The year the Legislature added sexual orientation to the LAD, Governor Jim Florio signed an executive order prohibiting sexual orientation discrimination by state government. *See* State of New Jersey Exec. Order No. 39 (Aug. 16, 1991).

that such harm occurs and that government can and should act to remedy it. Since *Brown*, this Court, Congress, and the executive branch have all recognized and acted repeatedly to rectify the harms and injustices of racial and other discrimination. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 592-95 (1983). Moreover, this Court has recognized that such discrimination injures not only the stereotyped individual, but society as a whole:

> [D]iscrimination based on archaic and overbroad assumptions about the relative needs and capacities of [classes of people] forces individuals to labor under stereotypical notions that often bear no relationship to their actual abilities. It thereby both deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.

Roberts, 468 U.S. at 625 (citations omitted). The New Jersey Supreme Court has likewise recognized these varied harms of discrimination. *David*, 212 A.2d at 359 ("[P]revention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State.").

The social science on which courts have relied consistently shows that discrimination injures the targets of prejudice both physically and psychologically. *See generally* Gordon Allport, *The Nature of Prejudice* (1954) (hereinafter, "Allport, *Prejudice*"); Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (1963); Edward E. Jones et al., *Social Stigma: The Psychology of Marked Relationships* (1984). Expressions of bias against gay people have historically been particularly intense. Gay people "have been the object of some of the deepest prejudice and hatred in American society." Gary B. Melton, *Public Policy and Private Prejudice*, 44 Am. Psychologist 933, 934 (1989). That most children internalize "acceptable" sex and gender roles from an early age further ingrains the prejudice against lesbians and gay men. *See, e.g.*, Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 L. &

Sexuality 133, 345 (1991) (hereinafter "Herek, *Myths*"); Commonwealth of Mass., *The Governor's Commission on Gay and Lesbian Youth, Education Report: Making Schools Safe for Gay and Lesbian Youth*, at 9 (Feb. 25, 1993) (97% of students in Massachusetts high schools reported hearing homophobic remarks at school).

Harassment and outright physical violence are the most visible and immediately harmful effects of anti-gay discrimination. In repeated surveys, an average of 44% of gay people reported that they have been subjected to threats of violence, and 80% reported verbal abuse, simply because they were perceived as gay. Kevin T. Berrill, *Anti-Gay Violence and Victimization in the United States: An Overview* in *Hate Crimes: Confronting Violence Against Lesbians and Gay Men* 19, 20 (Gregory M. Herek and Kevin T. Berrill eds. 1992); *see also* Gregory M. Herek et al., *Psychological Sequelae of Hate Crime Victimization Among Lesbian, Gay and Bisexual Adults*, J. Consulting and Clinical Psych. 1 (1999) (hereinafter "Herek, *Psychological Sequelae*") (study of 2259 lesbians, gay men, and bisexuals found approximately one-fifth of females and one-quarter of males experienced bias-related criminal victimization).[18]

The phenomenon of "gay bashing," in which people known or perceived to be gay are subjected to brutal, sometimes fatal, beatings, has been well documented. Brian Magruder et al., *The Relationship Between AIDS-Related Infor-*

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[18] Crime statistics confirm this picture. *See* FBI Uniform Crime Reporting Program, *Hate Crime Statistics 1997* (listing 1,375 offenses committed against gay, lesbian, and bisexual people in the United States, including three murders, five rapes, and 550 assaults); Nat'l Coalition of AntiViolence Programs, *Report: Anti-Lesbian, Gay, Bisexual and Transgender Violence in 1998*, at 10-15 (Apr. 6, 1999) (anti-gay violence resulting in murder skyrocketed by 136%, serious assaults were up 12%, inpatient hospitalizations rose by 108%). Many gay and lesbian crime victims are further victimized when they report the crime to the police. *Id.* at 21-24 (20% of people reporting anti-gay incidents were verbally and/or physically abused by police).

mation Sources and Homophobic Attitudes: A Comparison of Two Models, 25 J. Homosexuality 47, 48 (1993); Carol Ness, *Gay Bashing Reportedly More Violent in Bay Area*, San Francisco Examiner, Mar. 12, 1996, at A3. Growing awareness of violence against gay people has spurred passage of civil rights legislation in many jurisdictions. *See In re Joshua H.*, 17 Cal. Rptr. 2d 291 (Cal. Ct. App. 1993); *People v. Grupe*, 532 N.Y.S.2d 815, 819 (N.Y. Crim. Ct. 1988).

Three recent high profile incidents have graphically illustrated the most heinous form of gay-bashing: torture and murder because of sexual orientation. In October 1998, Matthew Shepard, a University of Wyoming freshman, died after he was tied to a post, beaten, burned, and left bleeding and unconscious in near freezing temperatures, because he was gay. *See* Howard Chua-Eoan, *That's Not a Scarecrow: A Brutal Assault in Wyoming and a Rise in Gay Bashing Fuel the Debate Over Sexual Orientation*, Time, Oct. 19, 1998, at 72. In March 1999, Billy Jack Gaither was stuffed into the trunk of a car, driven fifteen miles to an isolated area, and beaten to death with an ax handle, because he was gay. Sylvester Monroe, *A Burning in Alabama, The Savage Murder of a Gay Man Stuns a State Where Hate Crimes Do Not Protect Homosexuals*, Time, Mar. 15, 1999, at 47. Finally, in July 1999, Private First Class Barry Winchell was beaten to death by a fellow soldier after he "repeatedly experienced taunting with antigay slurs and ... superiors did not intervene." Steven Lee Meyers, *Army to Expand Inquiry in Death of Gay*, N.Y. Times, Jan. 10, 2000, § A, at 13.

Overt physical victimization often has an equally severe psychological impact. Herek, *Stigma*, at 74. The harmful effects of prejudice generally include "considerable distress, including feelings of personal loss, rejection, humiliation, and depression; agitation, restlessness, and sleep disturbances; somatic symptoms such as headaches and diarrhea; and deterioration in personal relationships." Herek, *Myths*, at 147; *see also* Linda D. Garnets et al., *Violence and Victimization of Lesbians and Gay Men: Mental Health Consequences*, 5 J.

Interpersonal Violence 366 (1990); Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. Health & Soc. Behav. 38 (1995). Being the target of discrimination also leads to a sense that life is unfair and unjust, a persistent sense of vulnerability, and the feeling of being punished for being gay. Herek, *Stigma*, at 60, 74; *see also* Herek, *Psychological Sequelae*, at 1 (recent hate crime victims displayed significantly more symptoms of depression, anger, anxiety, and post-traumatic stress).[19]

Self-identified gay and lesbian young people, who often struggle with acceptance of their sexual orientation without any social support structure, also attempt suicide at a disturbing rate.[20] Curtis D. Proctor & Victor K. Groze, *Risk Factors for Suicide Among Gay, Lesbian and Bisexual Youths*, 39 Social Work 504-13 (Sept. 1994) (of 276 self-identified as gay, lesbian, or bisexual, 40.3% had attempted suicide); Joyce Hunter, *Violence Against Lesbian and Gay Male Youths*, 5 J. Interpersonal Violence 295-300 (Sept. 1990) (in study of 500 youths seeking services at community based agency targeting lesbian and gay male teenagers, 40% had experienced violent physical attacks, 46% of which were gay-related, and 41% of girls and 34% of boys reporting violent assaults had tried to kill themselves); Paul Gibson, *Gay Male and Lesbian Youth Suicide* in *Report of the Secretary's Task Force on Youth Suicide, Volume 3: Prevention and Interventions* (U.S. Dep't of Health & Human Servs. 1989) (gay youth are two to three

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[19] Anti-gay bias may also have negative consequences for heterosexual people. Herek, *Stigma*, at 60, 75 ("Because of the stigma attached to homosexuality, many heterosexuals restrict their own behavior in order to avoid being labeled gay .... Antigay prejudice also interferes with same-sex friendships. Males with strongly antigay attitudes appear to have less intimate nonsexual friendships with other men than do males with tolerant attitudes.").

[20] In fact, BSA learned that Dale was gay because of his participation in a conference that "addressed the unique problems faced by homosexual teenagers struggling to come to terms with their sexual orientation, including an alarmingly high incidence of suicide attempts." 89a n.4.

times more likely to attempt suicide and may comprise up to 30% of youth suicides annually).

Gay people who do not conceal their orientation are also widely subjected to discrimination in jobs, housing, education, access to public recreation facilities, and in many other settings. *See, e.g.*, Herek, *Stigma* at 60-61 (nearly half of gay respondents in survey reported economic or social discrimination). Even where gay people have not been so excluded, they have often been forced by prejudice to remain invisible — in the proverbial closet — to avoid being subjected to the physical, emotional, and economic traumas described above. *See id.* at 74-75. Beyond its psychic toll, this invisibility keeps gay and heterosexual people apart as effectively as a segregated city bus. As late as the mid-1990s, this psychological ghettoization was still so widespread that most heterosexual people believed, contrary to statistical likelihood, that they did not know anyone gay in their daily lives. *See* Gregory M. Herek & John P. Capitanio, *"Some of My Best Friends": Intergroup Controversy, Concealable Stigma, and Heterosexuals' Attitudes Toward Gay Men and Lesbians*, 22 Personality & Soc. Psych. Bulletin 412, 415 (1996) (31.3% report knowing someone who is gay or lesbian); Alan L. Ellis & R. Brent Vasseur, *Prior Interpersonal Contact with and Attitudes Towards Gays and Lesbians in an Interviewing Context*, 25 J. Homosexuality 31, 35 (1993) (20% have close friend or relative whom they know to be homosexual).

Whether or not they hide their orientation, gay people "must continually confront societal belief systems which strongly contradict the value of their personhood," Geraldo Lima et al., *The Relationship Between Homophobia and Self-Esteem in Gay Males with AIDS*, 25 J. Homosexuality 69, 74 (1993), and that may have a severe impact on their self-esteem. Some may even internalize the prejudice, that is, their "self-concept will match . . . [their] perception of how others respond." John A. Jacobs & William H. Tedford, Jr., *Factors Affecting the Self-Esteem of the Homosexual Individual*, 5 J. Homosexuality 373, 373 (1980) (citations omitted). These

psychological injuries harm society by depriving it of the full contributions of all of its citizens.

C. The Application of the LAD to Eradicate Sexual Orientation Discrimination Helps Remedy the Harms Suffered by Gay People

The LAD has been a powerful weapon for reducing the harms of discrimination detailed above. Its broad application to remedy sexual orientation discrimination is necessary to effectuate fully the Legislature's goal of eradicating such harms.

Civil rights legislation has had a salutary impact on the lives of racial, ethnic, and religious minorities, reducing violence, opening economic opportunities, and decreasing many of the other ill effects of prejudice. *See Harris v. Marsh*, 679 F. Supp. 1204, 1220 (E.D.N.C. 1987). ("[T]his nation can generally point with some pride to the remarkable progress that has been made in the last four decades in eliminating the effects of past discrimination. Some of the improvement is directly attributable to anti-discriminatory laws passed by Congress and the state legislatures. . . ."). It is no exaggeration to say that civil rights laws generally have saved lives and have opened new horizons of opportunity for thousands of people. Such laws have had another effect that is less readily apparent but no less important in reducing the long-term harms of discrimination: bringing people together and reducing the ignorance and fear that lead to prejudice and hatred.

Social scientists have long understood that one of the root causes of prejudice is simple ignorance. When classes of people are kept apart by law or custom, individuals in one group lack exposure to individuals in the other. In the absence of first-hand knowledge, myths and stereotypes may take on undue credence and fear of the different or unknown may grow into hatred for members of the alien group. Allport, *Prejudice*, at 264-68. Conversely, familiarity tends to dispel prejudice. For example, a person who has gay colleagues, friends, or relatives is substantially less

likely to hate gay people and to harbor false stereotypes about the character and behavior of gay people generally. *See* Herek, *Stigma*, at 76-77 (citation omitted). Thus, in addition to preventing violence and discrimination against individuals, and without targeting expression or the ability to hold contrary beliefs and practices, the LAD helps reduce harmful biases in the long run by helping to reduce economic and social segregation.

Here, the LAD serves the exact purpose for which it was created: It prohibits BSA – which plays such a central role in so many communities – from relying on discredited myths and stereotypes to justify excluding gay scouts simply because of their status. BSA's members do not associate to express the view that homosexuality is immoral, and there is no basis to assume that a gay scout will act in ways that undermine the views and activities that actually do bring scouting's members together. But even if James Dale's mere continued presence, after a dozen years of sterling service, would somehow have some small impact on BSA's First Amendment rights, that intrusion is far outweighed by New Jersey's compelling interest in eradicating sexual orientation discrimination. *See Board of Directors of Rotary Int'l v. Rotary Club*, 481 U.S. 537, 548-49 (1987) ("compelling interest in eliminating discrimination" outweighs "some slight infringement" on associational rights). The court below properly so held.

CONCLUSION

The judgment of the New Jersey Supreme Court should be affirmed.

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Respectfully submitted,

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